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In The

Supreme Court of the United States

October Term, 1977

No. 77-1489

STATE OF NEW JERSEY,

Petitioner,

vs.

JOSEPH S. PORTASH,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATE OF NEW JERSEY,

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JOSEPH S. PORTASH,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Joseph Portash, respectfully prays that a petition for writ of certiorari sought by the State of New Jersey to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division, entered in this proceedings on June 29, 1977 be denied.

OPINION BELOW

The opinions of the State courts are included in the appendix of the State's petition.

JURISDICTION

The respondent, Joseph Portash, contests the jurisdiction of this Court for the reasons set forth in this brief.

QUESTIONS PRESENTED

I. The method by which the respondent invoked the privilege against self incrimination was proper and was a matter of procedure of the courts of New Jersey and does not present a substantial federal question.

II. The decision rendered by the New Jersey Appellate Division was based upon the interpretation of the New Jersey statutes in relation to the New Jersey Constitution and as such does not present a controversy to come within the jurisdiction of the Supreme Court of the United States.

III. The State should not be permitted to impeach a defendant at subsequent criminal trial with defendant's prior immunized Grand Jury testimony compelled by the State on investigation of identical matter.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Fifth Amendment.

> "No person shall be compelled in any criminal case to be a witness against himself as applied to the State of New Jersey through the Fourteenth Amendment."

New Jersey Public Employees Immunity Statute, N.J.S.A. 2A:81-17.2a2.

> "If any public employee testifies before any Court, grand jury or the State Commission of Investigation, such testimony and the evidence derived therefrom shall not be used against such public employee in a subsequent criminal proceeding under the laws of this State; provided that no such public employee shall be exempt from prosecution or punishment for perjury committed while so testifying."

Statute was amended after respondent testified before the Grand Jury and in its present form states:

> "If any public employee, *having claimed the privilege against self-incrimination,* testifies before any court, grand jury or the State Commission of Investigation *after having been informed that his failure to appear and testify*

would subject him to removal from his office, position or employment, such testimony and the evidence derived therefrom shall not be used against such public employee in a subsequent criminal proceeding under the laws of this State; provided that no such public employee shall be exempt from prosecution or punishment for perjury *or false swearing* committed while so testifying."

STATEMENT OF THE CASE

Joseph S. Portash, respondent herein, worked as an Assistant Ocean County Planner in 1960, whereafter, he was appointed and later elected as a member of the Manchester Township governing body in Ocean County. Prior to this time, the concept of a senior citizens development had begun in neighboring communities. In 1964, as Mayor of Manchester, he promoted the concept of Senior Citizen Family Developments. Similarly, he developed a unique real estate analysis method used in selecting a site for the Ocean County College. In 1969, he began informal work for the Madison Agency, a real estate and insurance agency in Lakewood, Ocean County, New Jersey. A few months after that relationship began, Joseph S. Portash was appointed to the Board of Freeholders, at which time he left his position as Ocean County Planner.

Eventually, in 1971, Joseph Portash became a formal employee of the Madison Agency and began receiving paychecks. At that time, he received a promise of $5,000 for past services and $10,000 advance on future services. Work for the

Madison Agency consisted of site analysis projects outside Manchester Township on development of real estate projects in Ocean County, and conferences with Donald Safran, the owner of the Madison Agency. During this period of time and while acting as Mayor of Manchester Township, a member of the Municipal Utilities Authority, and as Freeholder Director, Joseph S. Portash voted on several items involving Leisure Technology Corporation, which was engaged in business in Manchester Township. Many of these votes hindered projects already begun by Leisure Technology and imposed requirements upon Leisure Technology at considerable increased cost to the corporation; requirements which other municipalities had not even requested. (See testimony of Justin Segal.) Many of the foregoing facts were not brought out at trial and were not presented to the jury, as the trial court's ruling precluded the respondent from taking the witness stand in his own behalf.

In 1970, the Township of Manchester created a Municipal Utilities Authority, of which Joseph S. Portash, as Mayor of Manchester Township, was appointed a member.

Meanwhile, and for a considerable amount of time prior to 1970, the Madison Agency had been servicing Leisure Technology, providing it with various forms of insurance coverage. Indeed, the Madison Agency received checks periodically to cover the premiums on said insurance and numerous loans which Robert Schmertz made to Donald Safran (as indicated by testimony of Madison Agency bookkeeper, Catherine Prisco).

Prior to the creation of the Municipal Utilities Authority, Manchester Township had given franchises to other senior citizens developments including Crestwood Village, in the case of water and sewer, and Cedar Glen Lakes, in the case of water. In order to induce Leisure Technology to develop in Manchester Township, the municipal body in early 1970 unanimously agreed to award Leisure Technology a franchise for sewer and water (as indicated in testimony of Seymour Kagan, Attorney for Manchester Township Municipal Utilities Authority). On July 1, 1971, Joseph S. Portash was formally hired by the Madison Agency to do site analysis and render consultation services as a Professional Planner. Had Mr. Portash been able to testify, he would have indicated that he had no knowledge of any connection between Leisure Technology and the Madison Agency at the time of his employment and indeed, never learned of the fact that Schmertz was an equal but silent partner during his employment. Portash's pay during that time netted, after taxes, $241.20 per week, which was paid to him by check in the ordinary course of business of the Madison Agency. During this period of time, applications before the Ocean County Planning Board concerning Leisure Technology as well as other developers were considered. Several times Joseph Portash was absent during the voting on these matters, (as indicated by testimony of George Buckwald, County Planning Board Chairman). Indeed, in instances where a vote was taken involving matters in which the defendant knew he had a conflict, including matters brought to the Board by First State Bank, a bank in which Mr. Portash was a director, Mr. Portash would abstain. On September 23, 1971, the Madison Agency received a $15,000 check from Leisure Technology. Thereafter, $15,000 went from the Madison Agency to the Insurance Company of

North America, as stated in the testimony of the Madison Agency bookkeeper, Mrs. Prisco, who explained generally the accounts and the activity in those accounts of the Madison Agency (T5 entire volume). The tracing of the $15,000 check through the accounts is particularly stated at T5 170-3 to 172-4 wherein the witness testified that the check came from Leisure Technology to the Madison Agency on September 23, 1971 and on the next day a check in the amount of $15,000 was made payable from the same account (Account No. 103, a non payroll account of the First State Bank) to Insurance Company of North America, in payment for Leisure Technology insurance premiums. The Attorney General insisted that the payment was for Joseph Portash, notwithstanding the unrebutted proof to the contrary. Had respondent been permitted to testify at trial he could have resolved any question of guilt in his favor.

Prior to his trial on November 6, 1974, Joseph Portash appeared with counsel before a State Grand Jury investigating Robert Schmertz, Leisure Technology's President, and Madison Agency principal. Respondent's appearance before the Grand Jury was in response to a subpoena served upon him on October 29, 1974. He expressed his intention of claiming his Fifth Amendment privilege against self-incrimination. Subpoenaed again for November 14, 1974, Joseph Portash was granted immunity in the following terms;

> "We have agreed that the testimony that Mr. Portash is about to give before the Grand Jury, under oath, that any adverse evidence derived therefrom shall not be used in any subsequent criminal prosecution against him, except for a

> prosecution for contempt, false swearing or perjury. No representations have been made insofar as prosection for any offenses for which evidence has already been presented to a State Grand Jury, a separate Grand Jury from the one Mr. Portash is about to appear before."

Respondent was asked whether he understood the purport of this agreement.

> "Mr. Luciani: [Deputy Attorney at Grand Jury proceeding and co-counsel at subsequent trial] Mr. Portash, do you understand, have you discussed this matter with your attorney?
>
> Mr. Portash: I believe so.
>
> Mr. Luciani: And you understand the fact that nothing you are about to testify to can be used against you, personally, in any subsequent criminal prosecution?
>
> Mr. Portash: To the best of my knowledge of legal matters, yes."

Respondent than testified before the Grand Jury.

Thereafter, the State contacted the respondent and took another statement on February 5, 1975, based on information learned by the State as a result of respondent's immunized Grand Jury testimony. No agreement was ever reached with

regard to whether Mr. Portash would step down from office or make payment, as the State urges in its brief in support of the petition for certification. During this time the State had several meetings with the respondent directly, both in person wherein the Deputy Attorney General, G. Michael Brown, discussed Mr. Portash's potential testimony and advised him that he would have to alter or strengthen his testimony in order to successfully prosecute other defendants (T13 29-15 to 30-17). Also, Mr. Luciani initiated several telephone conversations with Mr. Portash, one of which was more than an hour's length in duration. The State urges in its brief that he reluctantly agreed to this "extraordinary" circumstance. It declines to mention that the initiation for these extraordinary circumstances was by the Deputy Attorney General involved.

The State attempts to paint the respondent as the pursuer of the Attorney General in its petition. That is neither truthful nor sensible. The State was initiating the investigation, was pursuing witnesses, among whom was Mr. Portash, and contacts were initiated by them. They were not the reluctant, unwilling pawns, as they would have themselves characterized by their statement of facts. They were, to the contrary, aggressive seekers of Mr. Portash's cooperation. Long colloquies in the petitioner's statement of facts are inserted, apparently, for the purpose of justifying the State's attempt to remove respondent from his official positions and extract from him amounts of monies, which would be paid to the State. This campaign was carried on actively by the State but the respondent never made a commitment to make payments or to resign from any public office. The State further contends that they obtained information in preliminary negotiations which deemed it

advisable on their part to seek the resignation of Mr. Portash from the Pineland's Environmental Council. No testimony was ever given which could logically be construed to suggest his removal from that body, and this is a blatant attempt to character assassinate by innuendo the respondent without any justification in fact.

The State contends that the statement given by the respondent subsequent to his immunization before the Grand Jury on February 5, 1975 was a non-immunized statement (Petition, 6). It is clear that these statements were derived directly from the immunized testimony and therefore were also immunized. The speciousness of the petitioner's argument is fashioned at this level out of a desperateness to excoriate the respondent without regard to the legality or propriety of the method used. Respondent indicated in the Grand Jury testimony that he had "reconstructed" certain records from his employment with the Madison Agency. Such reconstruction is characterized by the petitioner in his brief to be "fabrication." The petitioner's statement of facts amounts to a rambling diatribe against respondent, which has little or no support in the record of the case.

Joseph Portash was indicted by a State Grand Jury, with misconduct in office and extortion by a public official.

The case was in trial for 16 days during which time numerous witnesses testified for the State and the defense. The jury thereafter deliberated approximately 17 hours over two days and for 12 consecutive hours on February 11, 1976, the date on which the jury reached its verdict. The jury found the

respondent not guilty of misconduct in office, but guilty of wrongful taking.

The court, by allowing the State to use the respondent's prior immunized testimony for impeachment purposes if he testified in his own defense, placed the respondent in a position where he was not able to take the stand. Therefore, much of the respondent's testimony and evidence was not linked up. (See proffered testimony of Senator William Hiering and John Sweeney.)

Respondent appealed to the New Jersey Superior Court Appellate Division which reversed the conviction on the ground that the State had improperly and unconstitutionally sought and obtained a ruling that it could use the immunized Grand Jury testimony in cross-examination of the respondent at trial. Because of this decision the Superior Court Appellate Division did not address itself to the other issues raised by the respondent on appeal. Petitioner appealed as of right, and by way of petition for certification to the New Jersey Supreme Court. The appeal was dismissed and petition denied by the New Jersey Supreme Court. Thereafter the State of New Jersey filed a petition for certiorari to this Court.

REASONS FOR DENYING THE WRIT

Point I

The method by which the respondent invoked the privilege against self-incrimination was proper and was a matter of procedure of the courts of New Jersey and does not present a substantial federal question.

As the Appellate Division of the State of New Jersey pointed out, in its opinion below, respondent appeared on November 6, 1974 with counsel before the State Grand Jury investigating Robert Smertz (a target of State investigation) in response to a subpoena served upon respondent, on October 29, 1974, and expressed his intention of claiming the Fifth Amendment privilege against self-incrimination. Subpoenaed again for November 14, 1974, respondent was granted immunity in the following terms:

> "We have agreed that the testimony that Mr. Portash is about to give before the Grand Jury, under oath, that any adverse evidence derived therefrom shall not be used in any subsequent criminal prosecution against him, except for a prosecution for contempt, false swearing or perjury. No representations have been made insofar as prosecution for any offenses for which evidence has already been presented to a State Grand Jury, a separate Grand Jury from the one Mr. Portash is about to appear before."

Respondent was asked whether he understood the purport of this agreement.

> "Mr. Luciani: [Deputy Attorney General for the State of New Jersey who also acted as co-counsel during the subsequent trial of respondent] Mr. Portash, do you understand, have you discussed this matter with your attorney?
>
> Mr. Portash: I believe so.
>
> Mr. Luciani: And you understand the fact that nothing you are about to testify to can be used against you, personally, in any subsequent criminal prosecution?
>
> Mr. Portash: To the best of my knowledge of legal matters, yes."

Thereafter defendant Joseph Portash was indicted and brought to trial. After completion of the State's case, respondent requested a ruling from the trial court as to whether the State would be permitted to use his Grand Jury testimony in cross-examination in the event he chose to testify on his own behalf. The trial court availed itself of extensive argument consisting of over 150 pages of daily transcript covering two days. Following such argument, the trial court ruled that the State would be permitted to refer to respondent's Grand Jury testimony in its cross-examination if inconsistent responses were elicited.

The State correctly points out in its present petition that "the privilege against self incrimination is one which normally must be claimed by the individual who seeks to avail himself of it for his protection". *Communist Party of United States v. Subversive Activities Control Board,* 367 U.S. 1, 107 (1961). Respondent's right against self-incrimination entitles him to remain silent unless he chooses to speak in the exercise of his own will, and to suffer no penalty for such silence. *Brooks v. Tennessee,* 406 U.S. 602 (1891). In the case at bar, respondent's counsel and the State consumed 150 pages of transcript in an attempt to invoke the Fifth Amendment privilege against self-incrimination and the protection of the immunity statute. No clearer fact can be demonstrated from a reading of the transcript. The respondent refused to take the stand for the very purpose of protecting his Fifth Amendment privilege. Refusing to testify is in itself an assertion of the Fifth Amendment guarantee. That right is never lost unless voluntarily and intelligently waived. *Smith v. United States,* 337 U.S. 137 (1949).

No case cited nor known to this writer stands for the proposition that the defendant must take the stand in trial to invoke his Fifth Amendment privilege against self-incrimination. Indeed, the contrary rule prevails, that upon taking the stand to offer testimony, the defendant waives his privilege against self-incrimination. See *Smith, supra.* A witness may refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. *Lefkowitz v. Cunningham,* —U.S.—, 53 L. Ed. 2d 1 (1977).

The trial judge invoked the proper procedure by rendering a decision with respect to the question of the Fifth Amendment privilege against self-incrimination, covering the admissibility of the Grand Jury testimony which the prosecutor would be proffering. Rule Eight (8) of the *New Jersey Rules of Evidence,* vests in the court the power and imposes obligation upon the trial judge to make a determination as to conditions precedent involving areas of a witness' qualifications as to whether the existence of a privilege or the admissibility of evidence has been met. Such a ruling was sought in the instant case and the court, after extensive argument, rendered a decision which was subsequently reversed by the State's Appellate Division.

The trial court was obligated to use the procedure it employed to properly apprise the respondent of the full ramifications of his taking the stand. Indeed, case law is clear, that although the privilege against self-incrimination must be claimed and may be waived, the witness, after having claimed the privilege, can not properly be held to have waived such privilege and consequent immunity on vague and uncertain evidence inasmuch as waiver of constitutional rights is not to be inferred. In the case at bar, the State now urges that the respondent should be placed in the vague and uncertain atmosphere of not knowing the extent of his protection prior to taking the stand. Indeed, upon taking the stand, the respondent would have waived his right against self-incrimination without full knowledge of the extent of the waiver and the State would then be in a position to argue that the respondent had waived his Fifth Amendment privilege. See *Smith v. United States, supra; Gardner v. United States,* 424 U.S. 648 (1976); *Lefkowitz v. Turley,* 414 U.S. 70 (1973). See also *Garrity v. New Jersey,* 385

U.S. 93 (1967). That the procedure employed by the court was the constitutionally proper procedure cannot be doubted, inasmuch as the State properly failed to object to the procedure at trial and further failed to directly raise the issue at a subsequent appeal. The State now comes before the United States Supreme Court presenting a specious argument having no constitutional viability in an effort to color the question as a substantial federal question, in order to invoke the jurisdiction of this Court.

Moreover, the entire issue raised by the State in Point I of their petition does not raise an issue of substantial federal question. The issue raised can only be characterized as procedural in nature and certainly not one of substance. The substantive question of the extent of the Fifth Amendment privilege against self-incrimination and immunity is addressed in Point III of respondent's brief in opposition to petition for writ of certiorari.

Moreover, if the Court is of the opinion that the procedure used by the trial court was erroneous, we respectfully urge this Court to consider the fact that the decision of the court was a procedural matter and does not raise substantive issues, thereby not bringing the question itself within the jurisdiction of this Court. *U.S.C.S., Supreme Court Rules of Court, Rule 19.* Additionally, the respondent should not be penalized by the trial court's procedure in ruling upon an evidential question.

Based upon the foregoing, it is respectfully submitted that when a defendant takes the stand to testify, he waives his right against self-incrimination. The State argues that the defendant

must take the stand before he can raise his Fifth Amendment protections. *Gardner v. United States.*, 424 U.S. 648 (1976). It is interesting to note that in the *Gardner* case however, the defendant voluntarily gave evidence without claiming his Fifth Amendment privilege. In the case at bar, the respondent claimed his Fifth Amendment privilege by refusing to testify based upon the ruling of the trial court, and thereby did not waive his privilege. The argument of the State creates a Hobson's Choice which has been resolved by the courts of New Jersey in the instant matter. *Garrity v. New Jersey,* 385 U.S. 493 (1967).

The Supreme Court of the United States decided the procedural versus a substantial federal question, in *Duncan v. Tennessee,* 405 U.S. 127 (1972), wherein certoriari was granted by the United States Supreme Court to consider questions seemingly presented under constitutional guarantee against double jeopardy, but, after review it appeared that such questions were so interrelated with the rules of the criminal pleading, particular to the State of Tennessee, the constitutionality of which was not at issue, as not to warrant an exercise of certoriari jurisdiction of this Court, and the writ was dismissed as having been inprovidently granted. The Supreme Court of the State of New Jersey has similarly decided with regard to the rule-making process of the court as contrasted to substantial questions. See *Winberry v. Salisbury,* 5 N.J. 240 (1950).

Point II

The decision rendered by the New Jersey Appellate Division was based upon the interpretation of the New Jersey statutes in relation to the New Jersey Constitution and as such does not present a controversy to come within the juridiction of the Supreme Court of the United States.

The New Jersey Appellate Division in rendering its decision made specific reference to the statutory basis upon which it was predicating its ultimate resolution of the dispute. That court in interpreting the granting of immunity given pursuant to N.J.S.A. 2A:81-17.2a2 stated:

> "A valid claim of the Fifth Amendment privilege against self incrimination made before a grand jury will, of course, be honored and the witness claiming cannot be required to testify. Because of the imperatives of investigation, however, the device of immunizing such testimony from later use against the witness in a subsequent criminal proceeding was fashioned as a means of compelling such otherwise privileged testimony without compromising the integrity of the constitutional protection afforded by the Fifth Amendment and cognate state constitutional guarantees. The immunity device, however, will only be deemed a sufficient answer to a claim of privilege if the scope of immunity afforded is commensurate in all respects with the privilege against self incrimination which it replaces.

> Citing *United States v. Calandra*, 414 U.S. 338, 346 (1974); *Kastigar v. United States*, 406 U.S. 441, 459 (1972)." 151 N.J. Super. 200, 205 (App. Div. 1977).

It is apparent from the foregoing that the Appellate Division based its decision not only on the Federal Constitution but also the State constitutional guarantees as they apply to New Jersey statutes.

It has been clearly held by the United States Supreme Court that the State courts are permitted and should be the sole arbiter of their State statutes and their State Constitutions as long as such interpretations do not afford a defendant with a lesser protection than the United States Supreme Court's interpretation of the United States Constitution. *State v. Johnson*, 68 N.J. 350 (1975); *Del Vecchio v. Bowers*, 296 U.S. 190 (1935).

The United States Supreme Court is not vested with jurisdiction to pass upon the expediency, wisdom, or justice of the laws of the State as declared by their courts, but only to determine their conformity to tne Federal Constitution and the paramount laws enacted pursuant to it. *Twining v. State of New Jersey*, 211 U.S. 78 (1908). No such claim is urged by the State. State courts are the final arbiters of their State's own laws. *Wardius v. Oregon*, 412 U.S. 470 (1973).

The United States Supreme Court must accept the construction of a State statute which the highest court of the State has put upon it. *Groppi v. Wisconsin*, 400 U.S. 505 (1970).

The construction of a State statute by the State's highest court is binding on the United States Supreme Court. *Einsenstadt v. Baird,* 405 U.S. 438 (1972).

In the case at bar, the New Jersey Superior Court, Appellate Division, rendered a decision interpreting a State statute in the light of the State constitutional guarantees. That decision was appealed by the State of New Jersey and petition for certification was addressed to the New Jersey Supreme Court, requesting that the Appellate Division be reversed. The New Jersey Supreme Court refused that request, denied the appeal and dismissed the petition. The New Jersey court's decision interpreting its statute in light of its Constitution is entitled to respect from the United States Supreme Court. The interpretation placed by the New Jersey courts should not be deemed to be a lesser standard than that which has been employed by the United States Supreme Court, as it affords coextensive protection guaranteed by the United States Fifth Amendment privilege from self-incrimination and is not inconsistent therewith. The decision of the New Jersey courts as it applies to the New Jersey statutue and the New Jersey State Constitution does not provide a substantial federal question to permit the State to come before the United States Supreme Court and seek relief, therefore, the State of New Jersey has no standing in this matter.

Point III

The State should not be permitted to impeach a defendant at subsequent criminal trial with defendant's prior immunized Grand Jury testimony compelled by the State on investigation of identical matter.

The State compelled the respondent by service of subpoena to appear before a State Grand Jury. The respondent invoked his United States and New Jersey State constitutional privileges against self-incrimination. The State Attorney General's office through Assistant Attorney General, Alfred Luciani, granted immunity under the New Jersey State Public Employee Immunity statute, N.J.S.A. 2A:81-17.2a2, in the following terms:

> "We have agreed that the testimony that Mr. Portash is about to give before the Grand Jury, under oath, that any adverse evidence derived therefrom shall not be used in any subsequent criminal prosecution against him, except for a prosecution for contempt, false swearing or perjury."

The Attorney General then questioned Mr. Portash:

> "Mr. Luciani: Mr. Portash, do you understand — have you discussed this matter with your attorney?
>
> Mr. Portash: I believe so.

> Mr. Luciani: And you understand the fact that nothing you are about to testify to can be used against you, personally, in any subsequent criminal prosecution?
>
> Mr. Portash: To the best of my knowledge of legal matters, yes."

Notwithstanding the promises and representations made by Mr. Luciani when granting the immunity to respondent, at the subsequent trial, Mr. Luciani urged that the State could use the immunized Grand Jury testimony and statements derived therefrom to impeach respondent's credibility by the use of any inconsistent statements made pursuant to respondent's grant of immunity. Respondent gave a number of statements under the Public Employees Immunity Statute which compelled such testimony. Mr. Luciani was aware that the statute in question and the United States Constitution prohibited the use at trial of immunized testimony in any fashion and correctly quoted the substance of the law to Mr. Portash when granting him immunity compelling him to testify before the Grand Jury. Thereafter, when it suited the State's purposes to utilize the immunized statements against repondent, the State sought to urge upon the court an interpretation of the law, contrary to the plain meaning of the statute; an interpretation which was completely contrary to the promises and representations of the Deputy Attorney General to respondent. The State conceded at trial that respondent's prior statements given under the grant of immunity had been factual and truthful, and points out in its brief that respondent never alleged that the statements were false in any regard. The State's brief deals with irrelevant propositions

of law dealing with the investigative powers of the Grand Jury. Respondent makes no dispute with respect to those propositions of law cited, indeed, he cooperated with the Grand Jury and testified after being given immunity.

Simply stated, the issue before this Court is whether immunized testimony may be used against a defendant in a subsequent criminal trial for a charge other than perjury or false swearing. This Court has ruled that if an immunity statute is to be constitutional, the protection afforded a witness who is granted immunity must be co-extensive with the privilege against self-incrimination itself. See *Kastigar v. United States,* 406 U.S. 441 (1972).

In *Kastigar, supra,* at 453, Justice Powell rendering the majority opinion stated:

> "We hold that such immunity from use and derivitive use is co-extensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader . . . Its sole concern is to afford protection against being 'forced to give testimony leading to the infliction of penalties affixed to . . . criminal acts.' (citing *Ullman v. United States,* 350 U.S. at 422 (1956) which quoted *Boyd v. United States,* 116 U.S. 616, 634 (1889).) Immunity from the use of compelled testimony,

> as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* (emphasis in original) respect, and it therefor insures that the testimony cannot lead to the infliction of criminal penalties on the witness."

In *Murphy v. Waterfront Commission,* 378 U.S. 52 (1964) the Court in construing another New Jersey Immunity statute at page 79 states:

> "A state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with the criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating a prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. This exclusionary rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity."

To the same effect see *United States v. Calandra,* 414 U.S. 338 (1974).

In *Kastigar, supra,* beginning at page 459, the Court discussed the difficulties raised by identifying information obtained either by testimony or cross-examination which compelled testimony may disadvantage a witness, especially in the jurisdiction granting immunity. The Court indicated that the burden would then shift, stating:

> "This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."

See also *Lefkowitz v. Turley,* 414 U.S. 70 (1973), wherein Justice White writing the majority opinion for the Court stated:

> "[But] the state may not insist that appellees waive their Fifth Amendment privilege against self-incrimination and consent to the use of the fruits of the interrogation in any later proceedings brought against them. Rather, the State must recognize what our cases hold: That answers illicited upon the threat of the loss of employment are compelled and inadmissible in evidence. Hence, if answers are to be required in such circumstances States must offer to the

> witness whatever immunity is required to supplant the privilege and may not insist that the employee or contractor waive such immunity."

The immunity required to supplant the privilege is that which will place the respondent in the same position he would have been in had he not been compelled to testify. *Kastigar, supra,* at 462. In the instant case, of course, had the respondent not been compelled to testify by the granting of the immunity herein there would be no statement available with which to cross-examine the defendant about possible inconsistencies to impeach his credibility.

As the opinion of the Superior Court of New Jersey, Appellate Division states:

> "The essential inquiry here, therefore, is whether the proposed use of the immunized Grand Jury testimony to impeach defendant's trial testimony would leave defendant and the State in the position each would have occupied had defendant's claim of privilege been honored. That inquiry can only be answered in the negative. Had defendant been permitted to refuse testimony before the grand jury on his claim of privilege, the present argument by the State could not even have been made; no testimony to be used for impeachment purposes would have existed. Had defendant's testimony not been compelled, he would have been able to testify at his trial free from the fear engendered by the

> possible use of prior inconsistent testimony for purposes of impeachment. It necessarily follows that if the grant of immunity is to be viewed as commensurate with the lost privilege against self-incrimination, than he should be accorded the same freedom to testify in his own behalf at trial as he would have enjoyed had he been permitted to remain silent before the grand jury."

The court continued:

> "A similar issue was considered and disposed of in *United States v. Hockenberry,* 474 F. 2d 247 (3 Cir. 1973). In *Hockenberry,* the prosecution used immunized Grand Jury testimony given by *Hockenberry* to impeach his credibility at his trial on a charge of some other wrong doing. The conviction was reversed on the grounds that the immunized testimony could not be so used without jeopardizing the adequacy of the immunity as a Constitutional means of compelling self-incriminatory testimony. The court in *Hockenberry,* observed in terms pertinent to the present matter: 'But for the grant of immunity *Hockenberry* would have been privileged to refuse to admit to the Grand Jury his wrong doing in the execution of Affidavits to obtain search warrants. And if immunity that deprived him of that privilege is to be, as constitutionally it must, co-extensive with the privilege itself, his compelled admission of wrong

doing cannot later be used to discredit his efforts to defend himself against the charge of some other wrong doing (*id* at 250)'. In this case, unlike *Hockenberry*, the immunized testimony was sought to be used to discredit defendant's effort to defend himself with respect to the very matters about which his testimony was compelled. The argument for excluding such testimony is, therefore, even more compelling in this case than it was in *Hockenberry*. *Portash, supra* at 205." (See also *Lefkowitz v. Cunningham*, —U.S.—, 53 L. Ed. 2d 1, 4 (1977).

The State contends in its recitation of the statute in question that inadequate remedy is at hand for penalizing the respondent in the event of perjury committed during his trial testimony. The contention is invalid. If the State believes that respondent testifies untruthfully at trial an indictment charging respondent with perjury or false swearing can be sought by the State and the immunized testimony and also respondent's trial testimony may be introduced to prove a case of perjury or false swearing. Such relief is clearly provided in N.J.S.A. 2A:81-17.2a2. Also, in the event that the State contended that the immunized Grand Jury testimony was perjured, respondent would not have been considered to have given it under immunity and it could be utilized against him free from the privilege accorded by the statute. See *United States v. Wong*, —U.S.—, 52 L. Ed. 2d 231 (1977) and *United States v. Mandujano*, 425 U.S. 564 (1976). Neither case pertains to the case at bar. In the instant matter, the State conceded that the testimony was truthful at the Grand Jury level but requested and obtained a

ruling from the trial court which prevented the defendant from taking the stand in the subsequent trial. *Lefkowitz v. Cunningham*, —U.S.—, 53 L. Ed. 2d 1 (1977).

The trial court's ruling to allow the State to use immunized Grand Jury testimony had a clear chilling effect on the respondent's right to take the stand. The case is clear that the State in the instant matter attempted to prevent the respondent, Mr. Portash, from defending himself at trial by the strategem of granting him immunity and compelling him to testify before the Grand Jury on the same matters upon which his case was presently pending before another Grand Jury from which the Attorney General's office subsequently requested an indictment. The impropriety here relates in part to the State's attempt to effectively deprive the respondent of his right to trial by jury, not on the basis of perjured testimony, because the State conceded that defense counsel's statement at trial that respondent's testimony before the State Grand Jury was true, but, on the basis that the State would be armed for the purposes of cross-examination with prior inconsistent statements which could arise merely because of the vagary of memory in any witness with the passage of time. The State attempted to use this compelled testimony in an unconstitutional fashion at trial. The courts of New Jersey have rejected the State's attempted use of such testimony.

CONCLUSION

For these reasons, a writ of certiorari requested by the State of New Jersey should be denied.

Respectfully submitted,

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